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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ASHTON IVAN HURST, Defendant and Appellant.	B206915 (Los Angeles County Super. Ct. No. YA060853)

APPEAL from a judgment of the Superior Court of Los Angeles County. Francis J. Hourigan III, Judge. Affirmed.

Janyce Keiko Imata Blair, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Beverly K. Falk, Deputy Attorneys General, for Plaintiff and Respondent.

Ashton Ivan Hurst appeals from the judgment entered following a jury trial that resulted in his conviction of first degree murder (Pen. Code, § 187, subd. (a)).[1] He was sentenced to prison for 25 years to life.

Appellant does not challenge the sufficiency of the evidence to support the judgment. He claims he was denied a fair trial and his rights to counsel and to present a defense. (U.S. Const., 6th & 14th Amends.) He assigns as prejudicial error the trial court's refusal to give his pinpoint instruction on imperfect self-defense based on evidence of his delusional thinking and its exclusion of expert testimony regarding motive and evidence tending to show the assault upon appellant was in conformance with the victim's character trait. He contends admission of his attorney-client communications deprived him of a fair trial and his right to counsel. He also contends the trial court abused its discretion in refusing to allow his choice of counsel to make objections to the prosecutor's argument. Appellant lastly contends the cumulative effect of these multiple errors resulted in a fundamentally unfair trial.

Based on our review of the record and applicable law, we affirm the judgment. Appellant's duplicative pinpoint instruction was properly refused. The trial court acted well within its discretion in excluding the proposed expert testimony regarding "overkill," which was irrelevant and not a proper expert witness subject, and "defensive rage killing," which was not relevant. The sexually related evidence offered to show the attack was consistent with the victim's character trait was irrelevant in the absence of evidence the victim had a character trait for forcible homosexual activity. The two letters written by appellant with the assistance of his jail cellmate are not protected under the attorney-client privilege and therefore impeachment of appellant with these letters did not abridge appellant's constitutional rights. The trial court did not abuse its discretion in refusing to allow Susan Wolk, an attorney who did not attend the presentation of

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

evidence, to make objections to the prosecutor's argument. The cumulative effect of appellant's assigned errors thus is nil.

BACKGROUND

We recount the evidence in accordance with the usual review standard. (*People v. Medina* (2009) 46 Cal.4th 913, 919.) On February 8, 2005, shortly after 6:00 p.m., in the vicinity of the Torrance library at 232nd Street and Arlington Avenue, Reeta Desai heard a man, apparently in real pain, loudly scream, "Help, help." As she approached, Desai noted the "help" sounds were almost gone but observed someone about the same height and weight as appellant screaming foul language as he did something with his hands and kicked "extremely" aggressively the stomach of a motionless person curled up on the residence lawn.

Running to the library, Desai encountered Darrell Gray, who directed her to summon the police. As Gray walked along 232nd Street opposite the residence, appellant, who appeared nervous and very aggressive, crossed over and asked, "What the f--k are you doing?" When Gray said he was just walking down the street, appellant, who was "right in [his] face," told him very loudly to "get the hell back where you were going." Gray left. He believed appellant "knew he screwed up, and he did not want anybody around."

Torrance police Sergeant Brian O'Steen and his partner arrived about 6:12 p.m. Appellant waved his hands in a summoning gesture as he walked from the front lawn towards the police car one house away. Blood was on his boots, jeans, and his left forearm, but no trace of blood was on his hands or fingernails.

The body of Robert Gauci clad in shorts, which were pulled down to his lower thigh area, was on the front lawn. Blood was on and around the body. Two pools of blood were in the front yard, and the sidewalk was blood spattered. There was blood on either side of the front door. Blood was also on the railing outside the door, on the porch, steps, and paved walkway.

When asked how badly Gauci was hurt, appellant responded, "He's dead. I killed him." Appellant added, "He's a rape suspect. You'll see. You'll see he's a rape suspect."

The paramedics pronounced Gauci dead at 6:30 p.m. He sustained six stab wounds, primarily to his neck, including one severing the carotid artery, which would have resulted in death within one or several minutes. Another severed a neck bone and spinal cord, causing immediate loss of respiration ability leading to loss of consciousness and eventual death.

During a taped interview, appellant told police about the fight between himself and Gauci, his mother's husband and his stepfather. Upon appellant's return home, Gauci exited his room naked. He told Gauci, "you know you should get out [of] my face." Gauci left and returned wearing shorts. After telling him he "asked for it," appellant hit Gauci "and it just kept going."

While in jail the night of the murder, appellant conversed with his mother and sister. In the taped conversation, appellant admitted to his mother that he struck Gauci inside and outside the house and that he beat Gauci to death. He related Gauci was trying to do some "[s]exual stuff" to him and he "kind of flipped out." Upon appellant's return home about 5:30 p.m., Gauci "came out naked and started talking to [him] all funny." He told Gauci he was "not that way" and punched Gauci, who then attacked appellant, and "things just kept going . . . from there." He added Gauci was "trying to be homosexual" with him and acknowledged kicking Gauci in the head and hitting him with a five-pound dumbbell while outside. Appellant's mother expressed disbelief and accused him of lying. When asked why he did not leave, appellant stated Gauci jumped in front of him, grabbed his private parts, and blocked the door. She again accused appellant of lying.

Appellant reminded her about the time he would wake up very drowsy without knowing what was wrong and said he had since figured out Gauci drugged him and tried "stuff" with him on days when she went to work, namely, after the drugging, Gauci molested him as he slept. His mother again accused him of lying.

He further related that after walking in on the naked Gauci, he accused Gauci of being a homosexual, which Gauci confirmed. When asked, "what, you don't like men," appellant responded, "hell no." Appellant then punched Gauci, who hit him back, and a struggle ensued. When Gauci said he was going to "f--k" him, appellant got "a weight" and hit him over the head and hit him again. Appellant explained he was "so scared" and thought he had "to kill him or something 'cause nobody's going to believe" appellant and because he did not want Gauci to be a "retard" for the rest of his life. His mother confirmed she did not believe him. He added that his brother Tony had seen photographs of men's rectal area on Gauci's computer.

Appellant told his sister that Gauci got naked and wanted to have anal sex. Appellant explained he tried to leave but Gauci locked the door. He then picked up the weight and hit Gauci. Appellant related Gauci "touched my peter, ooh . . . he violated me in a way that I'm [*sic*] never been, by oh, he violated me a lot of other times and I was trying to tell mom because I think he like does date rape drugs and stuff like that to people, to me at least. And I kept . . . waking up thinking oh, but I, like I was dreaming it, but my butt . . . and I told mom, and I moved out the first time . . . and then I was even homeless because of it, I was like I'd rather be homeless than have somebody violating me."

When she asked how Gauci ended up in the front yard, appellant explained after he hit Gauci a couple of times in the back of the head with the five-pound weight, Gauci tried to run for help but appellant smacked his head in and stabbed him in the throat with a butcher knife he had retrieved from the kitchen.

During the sexual assault examination, appellant related while in the hallway, Gauci grabbed his genital area over his clothing but did not inflict any "physical blows." He did not mention any prior abuse by Gauci. He also denied any prior anal or genital injuries but refused an internal anal examination. He admitted beating Gauci to death but denied any weapons were involved.

Appellant presented evidence to show he entertained a reasonable belief or unreasonable belief arising from delusions that he had to kill Gauci in self-defense.

Three inconsistent versions of the killing were provided, one through his trial testimony, a second set forth in a letter, and a third in another letter.

At trial, appellant testified about what happened. On February 8, 2005, sometime past 5:00 p.m., he arrived home and went to his room. After Gauci called him to his room, he observed Gauci, who was naked, staring into the bathroom mirror. Appellant sat on the bed at his invitation. Gauci, now wearing shorts, sat down next to him and suggested he and appellant should have a relationship because he found appellant attractive. He moved closer and began rubbing appellant's leg, his crotch area, and the back of the leg. Gauci indicated he performed oral copulation "really good" and tried to kiss appellant, who backed away. Sliding closer, Gauci grabbed appellant's crotch. When his tongue was in appellant's ear, appellant pushed him off and rose from the bed, as did Gauci.

Appellant tried to walk out but Gauci blocked him and said he was not leaving. The two struggled, and appellant pulled Gauci by the hair down the stairs backwards from the bedroom, which was on the top level of the tri-level residence, to the second level. As they wrestled, Gauci got on top of appellant on the dining room floor and appellant placed him in a "headlock. Gauci then grabbed him hard by his penis. Appellant got up and hit Gauci five to 10 times in the face. After Gauci fell into a chair and hit the wall, appellant thought the fight was over. Instead, Gauci retrieved a knife from the kitchen and cornered appellant by the front entry of the house. Ignoring appellant's shouts to stop, Gauci with knife in hand advanced to about six to eight feet of appellant, who grabbed the coat tree to fend him off. After Gauci grabbed the coat tree, appellant dropped it, picked up the weight, and hit Gauci twice. He believed Gauci, who was angrier than ever, intended to stab him. Gauci, who was struck in the head, stumbled sideways but was still standing. He swung his hand overhead, came at appellant with the knife, and announced he was going to kill appellant.

Appellant opened the door, hit Gauci, who had grabbed appellant, and yelled "Help." Once outside the two fought. After dropping the weight on the porch, appellant continued to hit Gauci, who still held on to him as they moved toward the stairs. After

they fell down in the front yard, appellant got up and began kicking Gauci, who was on all fours. Gauci dropped the knife behind him after a kick to his head. Gauci rolled over to retrieve the knife, but appellant picked it up and stabbed him in the back of his neck from fear Gauci was going to stab him.

Afterward, appellant, who thought he was going to pass out, went inside and put the knife in the kitchen sink He began having delusions, and while washing the knife, his repressed memory of his 1997 and 1999 "rapes" by Gauci resurfaced.

He went outside and kicked Gauci for these prior incidents. Appellant, who was "still very upset" and "out of it," then confronted Gray, as possibly Gauci's homosexual boyfriend. Appellant remained at the scene to make sure no one approached the body, and when the police arrived, he felt "[l]ike a calm hysterical," his head was "racing," and he had a hard time dealing with what had happened. At trial, he could not recall what he said to Gray or the officers who arrived on the scene Appellant denied ever wanting to kill Gauci and having any intent to do so.

On cross-examination, appellant admitted writing two letters which related other versions of the murder. Exhibit No. 39 was a copy of his letter written about March 2005.[2] Exhibit No. 40 was a copy of his letter titled "Letter of Testimony."[3] He acknowledged the first letter was "extremely inconsistent" with his trial testimony and that the second letter was "different" from this letter.

In Exhibit No. 39, appellant gave this version of the killing: Upon entering the master bedroom at Gauci's request, appellant saw Gauci, who was naked, "finishing off a line of cocaine" and "very high." Gauci, whose eyebrow gesture suggested sex, asked if he wanted some. In response to appellant's change of facial expression "from shock to a disgusted look of amazement," Gauci stated angrily, "What, are you a little b--ch? What the fu--. I thought you knew. Don't be a little b--ch." Donning his shorts, Gauci went to

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2 Exhibit No. 39 consisted of a copy of the 10-page handwritten letter and a seven-page typed copy.

3 Exhibit No. 40 was a 16-page typed document.

a nightstand near appellant and said, "You're fu--ing dead." Appellant, thinking he was about to get a weapon, pushed Gauci, who then went at appellant.

Appellant ran downstairs and into the family room. Gauci also ran down the stairs but into the kitchen. As appellant ran past the kitchen to reach the front door, Gauci jumped out, cutting off his exit, and brought a butcher knife down towards appellant's chest and neck area. Appellant jumped back causing him to miss. He twisted the other's knife hand, and the knife dropped. A fistfight ensued, and the two struggled to reach the knife first. After appellant kicked the knife, it bounced off the front door, and Gauci grabbed it. Believing Gauci would stab him in the back as he ran out the door, appellant grabbed and threw a weight. Gauci, who was hit on the nose, lost his balance and fell, blocking the door. Appellant managed to open the door halfway and yelled for help. Gauci, who still held the knife, rose and yelled for him to "shut up." Appellant then struck him in the rib and face. After Gauci moved away, appellant was able to open the door. Appellant grabbed Gauci's knife hand and Gauci grabbed appellant's sweatshirt. As Gauci tried to stab him, appellant began hitting Gauci with the weight in the chest and face. At one point, appellant got behind Gauci and hit the back of his head with the weight. He yelled for help and pleaded unsuccessfully for Gauci to drop the knife. Appellant struck Gauci three more times in the head but the latter, who remained very alert, did not drop the knife.

After exiting, appellant dropped the weight in a planter. The two then descended the steps. Gauci continued to hold on to the knife and appellant's sweatshirt until they reached the middle of the front yard. Appellant headed for the street. Gauci raised the knife a last time. Appellant pulled his left arm, spinning him halfway around, and tripped him with his foot, causing Gauci to fall on the ground. He considered Gauci "very much a risk," because even on his knees, Gauci "was a manic monster with the knife in his hand."

Appellant kicked Gauci in the stomach and told him to drop the knife. Instead, Gauci called him more names and began to stand. Appellant kicked him in the face as hard as possible and again when Gauci tried to stand, causing Gauci to fall on all fours

and drop the knife. Gauci said something like, "I thought you knew." Appellant still in shock and panic and thinking he was fighting for his life kicked Gauci in the head six to eight times. The last kick knocked him out. Gauci was still breathing. Appellant picked up the knife to take it inside but then stabbed Gauci in the neck. He did not know why he did this but perhaps because he thought Gauci would "be hurt for the rest of his life" or "for whatever reason."

In Exhibit No. 40, appellant gave this third account of the murder. At 5:30 p.m., he peered into the bathroom expecting Gauci to be working on the sink or toilet. Instead, a completely nude Gauci was standing with his back to appellant. After appellant entered at the other's invitation, Gauci, who had an erection, quickly turned to face him, winked his eye, and raised his eyebrow to signal "some kind of sexual act to start." Shocked, appellant yelled, "You fag," announced his intent never again to live there or talk to Gauci, and turned around to leave.

Gauci responded that if appellant left he would not be coming back. Appellant told him, "Don't worry about that." Appellant searched around for his keys until he recalled they were in the entry door. As he ran past the dining area towards the door, Gauci, with butcher knife in hand, jumped out of the kitchen doorway and grabbed his sweatshirt. The two struggled over the knife as Gauci tried to stab appellant. At one point, Gauci lost his balance and fell to the dining room floor. Appellant twisted his arm, and the knife dropped to the floor. During the struggle to reach the knife, appellant asked what was going on. Gauci responded appellant "knew about it" but never said anything because he "liked it." This statement confirmed appellant's suspicions about being drugged and raped rather than simply having bad dreams. As the struggle resumed, they came to blows, and Gauci held on to appellant. At some point, a punch sent Gauci on the floor, and appellant began to run. Gauci caught his leg, causing appellant to hit the floor, and retrieved the knife.

As appellant reached the front door, he turned and punched the pursuing Gauci until he was able to knock the knife from his hand. The two wrestled. Appellant managed to pick up a five-pound dumbbell as Gauci picked up the knife. When he

pleaded with Gauci to stop, Gauci responded appellant was not going to leave. His attempt to stab appellant went awry, and appellant struck Gauci in the back of the head with the dumbbell. Gauci did not drop the knife as the fight continued for another minute. Appellant was in a panic, shock, and a fight for his life. He did not remember much of what happened afterward.

Appellant presented evidence that he was acting normally on the day of the murder. He also presented evidence about his friendly relationship with Gauci; two prior molestation incidents involving Gauci; sexually related photographs on Gauci's computer; appellant's history of mental illness; and appellant's nonviolent nature .

Sanjay Sahgal, a forensic psychiatrist, opined appellant was in "a rage and possibly a psychotic rage" based on what appellant related. He acknowledged his opinion would change if what appellant related about the killing were untrue. Dr. Sahgal further opined at the time of the killing appellant suffered from mental illness and likely from "delusional thoughts" but acknowledged he was legally sane. He understood the nature and quality of his actions and the difference between right and wrong.

Scott Fraser, a neurophysiologist, opined someone suffering from a fight or flight syndrome, a biologically based set of responses that arise when one is under very high stress involving fear or danger, will have poorer recall and accuracy of memory. He opined such an individual would continue to hurt someone no longer a threat.

In rebuttal, the People introduced a photograph showing right after the killing, garments and hats were on the coat rack near the front door, and the rack was upright. Evidence was presented to establish Gauci's nonviolent nature; his heterosexual relationship with his wife; and his rocky relationship with appellant.

Marc Alvillar, the head baseball coach at Los Angeles Harbor College, testified that about 5:00 p.m. on the date of the killing, Gauci related that he had to tell appellant "to leave the house." Gauci said it was "going to be a hassle," because he cared for appellant, who was not a "bad kid," but he could not have him "freeloading" and taking advantage of his wife.

Psychiatrist Gregory Cohen, who met with appellant on May 1 and 16, 2007, testified during this time, appellant never mentioned anything about being raped in 1997 or 1999 by Gauci although he did indicate he believed Gauci had raped him in 2000. He also did not mention writing two letters containing lies about Gauci. Dr. Cohen opined appellant's allegation of being drugged and raped by Gauci was a product of delusion and hallucinations. He further opined appellant did not meet the criteria for insanity, because he could not conclude appellant did not know the nature and quality of his behavior or its wrongfulness.

Based on his interview with appellant on April 11, 2007, and review of documents, Kaushal Sharma, a forensic psychiatrist, opined at the time of the killing, appellant understood the nature and quality of his actions and the wrongfulness of such conduct and that appellant was not insane. He opined appellant also was not psychotic at that time. Although appellant related Gauci had "raped" him on one occasion in 2000, he did not mention any such incident occurring in 1997 or 1999. He opined at the time he spoke with his mother and sister at the jail, appellant was not suffering from disorganized thinking.

In surrebuttal, appellant's mother testified appellant was very quiet, respectful, honest, and good. On several occasions, he told her Gauci probably was a "faggot." Gauci never told her he wanted to evict appellant. She testified Gauci told her he lost two knuckles on his right hand, because he hit someone hard in the face. Once she had to call 911 when Gauci began throwing things around and approached her in a scary way when she wanted to get romantic and he refused but Gauci did not touch her and no police report was made.

Rick Ibarra, who was at baseball practice the day Gauci died, testified he never heard Gauci say he had to evict appellant. Defense investigator Harold Hoffman testified he had no memory of or notation indicating Alvillar had mentioned he talked to Gauci on the day he died.

DISCUSSION

I. Refusal to Give Pinpoint Instruction Not Prejudicial Error

Appellant contends the trial court committed prejudicial error by refusing to give his pinpoint instruction on imperfect self-defense based on evidence of his delusional thinking. We disagree.

At issue is this pinpoint instruction: "A delusion is defined as a false conception and persistent belief unconquerable by reason in something that has no existence in fact [or] a false belief regarding the self or persons or objects outside the self that persists despite the facts. You may consider evidence of delusions, if any, in deciding whether [appellant] acted with an actual but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury."[4]

Whether a homicide is murder or voluntary manslaughter turns on malice. "Generally, the intent to unlawfully kill constitutes malice. [Citations.]" (*People v. Rios* (2000) 23 Cal.4th 450, 460.) One who unlawfully kills a human being with malice aforethought is guilty of murder. (§ 187, subd. (a).) In contrast, if the unlawful killing is committed without malice, the offense is voluntary manslaughter. (§ 192.) If established, imperfect self-defense negates malice and thereby reduces the offense from murder to voluntary manslaughter. (See, e.g., *People v. Rios*, *supra*, at pp. 460-461.) "*Imperfect self-defense* obviates malice because that most culpable of mental states 'cannot coexist' with an actual belief that the lethal act was necessary to avoid one's own death or serious injury at the victim's hand. [Citations.]" (*Id*. at p. 461.)

To establish imperfect self-defense, the defendant must show he "actually believed that he was in imminent danger of being killed or suffering great bodily injury; AND [he]

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[4] In addition to the above "Defense Pinpoint Instruction No. 2," appellant requested "Defense [P]inpoint Instruction No. 1," which would have allowed the jury to consider any evidence of delusion, as defined, in determining whether he acted with deliberation and premedication. In his reply brief, appellant acknowledges he does not challenge "the trial court's refusal to give this pinpoint instruction."

actually believed that the immediate use of deadly force was necessary to defend against the danger; BUT [a]t least one of those beliefs was unreasonable." (CALCRIM No. 571.)

The trial court instructed the jury on imperfect self-defense, which, if credited, would have reduced the killing of Gauci from murder to voluntary manslaughter.[5] A result more favorable to appellant would not have been reasonably probable if the refused pinpoint instruction had been given.

At trial, Dr. Sahgal opined appellant "likely had delusional thoughts. Both during [his] interview with [appellant] initially, and during the charged offense." In defining the term "delusion," Dr. Sahgal testified: "Psychiatry is a very ambiguous field. The definition of a delusion is, in turn, ambiguous. But a general marker for what defines a delusion is a fixed false belief that does not change in the face of evidence to the contrary."

Although the trial court did not give the requested pinpoint instruction, the essence of this instruction was before the jury through CALCRIM No. 3428, which instructed in pertinent part: "You have heard evidence that [appellant] may have suffered from *a mental disease, or defect, or disorder*. You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime, [he] acted or failed to act with the intent or mental state required for that crime. The People have the burden of proving beyond a reasonable doubt that [appellant] acted with the required intent or mental state, specifically: *'malice aforethought'* . . . . If the People have not met this burden, you must find [appellant] not guilty of murder." (Italics added.)

"'[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' [Citation.]" (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.) The jury

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[5] The court instructed the jury according to the standard instructions on murder and voluntary manslaughter (heat of passion and imperfect self-defense) (CALCRIM Nos. 500, 520-522, 570-571).

was expressly instructed to consider carefully all the instructions together. We presume the jury understood and followed the court's instructions by considering the instruction on imperfect self-defense in conjunction with CALCRIM No. 3428 and the instruction on murder, specifically what constitutes malice aforethought. (*People v. Holt* (1997) 15 Cal.4th 619, 662 ["Jurors are presumed to understand and follow the court's instructions"].)

The trial court therefore did not abuse its discretion in refusing to give appellant's duplicative instruction.[6] (*People v. Gurule* (2002) 28 Cal.4th 557, 659.)

II. Exclusion of Motive Evidence Not Abuse

Appellant contends the trial court abused its discretion in excluding testimony regarding "overkill" and "defensive rage killing," because such evidence was relevant to motive and material to his defense. We disagree.

A. "Overkill" Theory Evidence Properly Excluded

At a hearing, the prosecutor moved to exclude any testimony of Dr. Frank Sheridan regarding the "overkill" theory in his report on the grounds the subject was beyond his expertise and such evidence was irrelevant.

Dr. Sheridan, a forensic pathologist, acknowledged he was neither a psychiatrist nor forensic psychiatrist and did not testify about possessing expertise in psychology. He testified that in forensic pathology, the term "overkill" described the situation where the number of wounds, predominately aimed usually at the victim's head, neck, and upper torso, were caused by a sharp or blunt force which were well in excess of the average

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[6] This disposition obviates the need to address whether imperfect self-defense may be based on delusions on the part of the accused. (See *People v. Wright* (2005) 35 Cal.4th 964, 966, 974-975, 984, fn. 2 [concluding any error in excluding evidence of delusions to establish imperfect self-defense harmless and declining to determine whether imperfect self-defense is unavailable to a delusional defendant]; but see *People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437, 1456-1461 [delusion alone does not prove imperfect self-defense].)

number and many involved a considerable degree of force. He opined the subject killing was that of "overkill."

Dr. Sheridan conceded the prosecutor was probably correct in suggesting one did not have to be a forensic pathologist to realize more force than necessary was used to kill. He acknowledged "overkill" described injuries generally of a striking nature that were inflicted beyond that normally expected during a fight.

In his report, Dr. Sheridan stated the ferocity of this attack was due to the assailant's rage or frenzy, usually arising from some sort of sexual conflict between himself and the victim. At trial, he opined most "overkill" deaths involve jealousy, such as a domestic disturbance where one partner learned the other has been unfaithful. He testified that he had seen a couple instances involving a homosexual relationship. He referred to three articles, two written by the same author, when asked whether the "overkill" theory was generally accepted in the scientific community.

The trial court ruled Dr. Sheridan would not be allowed to testify Gauci's death was "overkill" arising from homosexual rage, because such testimony would invade the jury's fact-finding function and added the motive for the killing could be argued by counsel. The court further noted there was no evidence of the situations referred to by Dr. Sheridan involving an unfaithful partner, a domestic disturbance, and a homosexual relationship.

"If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is . . . [r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code § 801, subd. (a).)

"As a general rule, a trial court has wide discretion to admit or exclude expert testimony. [Citations.] An appellate court may not interfere with the exercise of that discretion unless it is clearly abused. [Citation.]" (*People v. Page* (1991) 2 Cal.App.4th 161, 187; accord, *People v. Valdez* (1997) 58 Cal.App.4th 494, 506.) A trial court has no discretion to admit irrelevant evidence. (*People v. Hamilton* (2009) 45 Cal.4th 863, 913.)

Exclusion of Dr. Sheridan's proposed testimony regarding an "overkill" theory was well within the trial court's discretion. His opinion about the nature and manner of administering Gauci's injuries as beyond that expected in a fight would not assist the jury, because such matters are within the jury's common experiences. (Cf. *People v. Gardeley* (1996) 14 Cal.4th 605, 617 ["subject matter of the culture and habits of criminal street gangs" beyond common experience].) His opinion such "overkill" arose from a sexual conflict was irrelevant in the absence of an unfaithful lover, a domestic dispute, or a homosexual relationship. (*People v. Snow* (2003) 30 Cal.4th 43, 87-88 [where no eyewitness identified defendant as killer expert eyewitness identification testimony excluded as irrelevant].)

B. "Defense Rage Killing" Theory Unsupported by Evidence

The defense proffered the testimony of Dr. Fraser, a professor, scientist, and neurophysiologist, on the subject of "defensive rage killing." At the hearing, Dr. Fraser testified "defensive rage" is a term describing the reaction of an organism attacked or perceiving an attack by a source larger or with greater resources than the organism. The organism responds by trying to counter what it considers to be "a major intrusion involving potential mortal danger." Defensive rage arises when an individual feels "cornered" and is distinguishable from predatory rage or violence, which transpires when an individual "deliberately tries to hurt or harm someone for a previous wrong or injustice."

Dr. Fraser opined although defensive rage might be connected with someone exercising self-defense, defensive rage usually involves fear more intense and beyond that experienced by an individual simply seeking self-preservation, namely, thwarting an attack or preventing the danger. He gave as a classic textbook example a "homosexual panic reaction," or the reaction of a homosexual when attacked. He clarified defensive rage also may involve reactions of homophobic individuals when attacked or those of someone coming to the aid of an attacked loved one. He did not know of any statistical analysis concluding one was more prevalent than another.

He further opined almost all violent reactions in a "defensive rage killing" are directed at the head and face, specifically, the eyes, nose, and mouth. He explained in contrast to a defensive rage killing, which is characterized by "massive maiming and lacerating of the facial structures of the head," revenge killings involve attacks on the torso and body.

The prosecutor objected to the proposed testimony on the grounds Dr. Fraser was not a qualified expert in the field and the absence of evidence that this subject was generally accepted in the scientific community. He also objected that the characteristics indicative of a "defensive rage killing" were absent in that this was not the case of a homosexual reacting to an attack or someone threatening a loved one, nor was there a massive maiming or lacerating of a facial structure.

In excluding the challenged testimony, the trial court explained a "defensive rage killing" was not the proper subject for expert testimony, because one of the defenses was self-defense.

A trial court's ruling on the admissibility of expert testimony is subject to the deferential abuse of discretion standard. (*People v. Curl* (2009) 46 Cal.4th 339, 359.) No abuse flowed from the exclusion of Dr. Fraser's proposed testimony, which was not relevant. (See *People v. Vera* (1997) 15 Cal.4th 269, 272 [correct decision but wrong reason upheld].) The manner of Gauci's death did not bear the tell-tale characteristics of a "defensive rage killing" in that the attack on Gauci was not directed at his face and did not involve massive maiming of a facial feature, i.e., nose, mouth, or eyes. Rather, appellant hit Gauci in the back of his head with the five-pound dumbbell and inflicted the fatal stab wounds to his neck. (*People v. Turner* (1984) 37 Cal.3d 302, 321 [no discretion to admit irrelevant evidence].)

III. Excluded Sexually Related Evidence Irrelevant

Appellant contends he was deprived of a fair trial and the right to present a defense by the trial court's exclusion of certain evidence to show Gauci's homosexual assault on appellant was in conformance with Gauci's character trait (Evid. Code, § 1103). This evidence was properly excluded for lack of relevancy. No evidence was

presented from which an inference could be drawn that Gauci had a propensity for forcible homosexually related activity.

During a search of six computers from Gauci's residence, various homosexually related e-mail and computer searches and pornographic photographs were found. Condoms, lubricant, and an object appellant characterized as a "sex toy" were recovered from Gauci's vehicle and photographed.

Seeking admission of the e-mails and photographs, appellant offered to show Gauci was the primary user of the computer and that the e-mails were signed with the name "Rob," a diminutive for Robert and attached to the electronic signature was Robert's cell phone number.

The trial court denied the defense motion for admission of the e-mails, pornographic photographs, and photographs of condoms, lubricant, and a "sex toy."[7] The court also denied the numerous mainly repetitive motions to reconsider and motions for mistrial based on the denial of the motions for admission of these items made during the course of the trial.

On appeal, appellant does not challenge respondent's assertion that he "provided no definitive means of proving that [Gauci] was responsible for the e[-]mails and computer searches" and he "also offered no evidence to show that [Gauci] had exclusive access to the vehicle or that the items belonged to him." Rather, he simply contends the absence of such showings merely goes to the weight of the evidence rather than the issue of admissibility. We need not, and therefore do not, address whether appellant showed

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[7] The court did allow appellant to call Marsha Barnet, a detective with the police computer forensic laboratory, to establish there were photographs on the hard drives depicting homosexual activity and to "briefly describe the images observed." Barnet testified she imaged all the hard drives of the six computers seized from Gauci's house and retrieved 15,000-16,000 total images, 24 of which related to homosexual pornography. She described the images as 98 percent depicting "straight" sex and 2 percent reflecting homosexual sex. Appellant employed this testimony in cross-examining certain Gauci character witnesses.

the requisite foundational nexus between Gauci and the items sought to be introduced as evidence. These items were properly excluded, because he failed to meet the threshold burden of showing the existence of the prerequisite character trait.

"In a criminal action, evidence of character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible . . . if the evidence is: . . . [o]ffered by the defendant to prove conduct of the victim in conformity with the character or trait of character." (Evid. Code, § 1103, subd. (a)(1).) A trial court's ruling on the admissibility of prior conduct of a sexual nature is subject to review for abuse of discretion. (See, e.g., *People v. Bautista* (2008) 163 Cal.App.4th 762, 782.)

Homosexuality is not the character trait at issue.[8] Rather, this character trait is a propensity for *forcible* homosexual activity. (See, e.g., *People v. Rowland* (1968) 262 Cal.App.2d 790, 797-798 ["Here the evidence of character was sought to establish that Fricke was of an aggressive homosexual character and from that fact to infer that he was making an aggressive homosexual advance towards defendant, which defendant had to ward off"].)

Appellant does not claim Gauci possessed the character trait of propensity for forcible homosexual activity. The record does not contain any evidence from which an inference that Gauci had such a propensity could be drawn. For instance, none of the pornographic computer images were suggestive or indicative of rape or assault. The e-mails also did not contain any information suggestive or indicative of forcible homosexual activity. Additionally, no evidence was presented that anything seized from Gauci's vehicle was a "sex toy," much less a homosexually related sex toy and that the condoms and lubricant found in the vehicle were for homosexual activity, forcible or

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[8] Defense counsel admitted it was "odd . . . to talk about someone being either homosexual or bisexual as being a character trait."

otherwise. The trial court therefore did not abuse its discretion in excluding the above items, which were irrelevant in the absence of such character trait.

IV. Attorney-Client Privilege Does Not Embrace Two Letters

Appellant contends the two letters he wrote and transmitted to his first counsel were admitted in violation of his attorney-client privilege. This privilege does not cover these letters.

Prior to appellant's testimony, the defense moved to exclude the letters on the ground of attorney-client privilege. At the hearing, appellant's attorney indicated if the letters were admitted, appellant would testify that his cellmate wanted to help him and told him what to say in the letters. The prosecutor argued the letters were not privileged, because appellant provided information to a third party who was not embraced by the attorney-client relationship. The court ruled the letters were admissible for impeachment purposes.

During cross-examination, appellant acknowledged writing the subject letters describing the events surrounding Gauci's murder. He testified these letters were prepared at the suggestion of Theodore Veganes, his first attorney, because he had difficulty talking about the killing. Appellant described how the letters were drafted by himself with the assistance of his county jail cellmate "Angel." As appellant was writing, Angel suggested he write lies and about things that would help himself in this matter and then Angel went through each page advising appellant what to write. Appellant explained he followed his suggestions, "because he's an older--experienced jailhouse lawyer." Appellant acknowledged the letters contained much that was not true. Upon completion, he sent the letters to his mother for her secretary to type. The letters were then sent to the office of his original counsel.

"[A] confidential communication between client and lawyer" is privileged. (Evid. Code, § 954.) Such confidential communication "means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or

those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." (Evid. Code, § 952.)

The subject two letters do not constitute "confidential communication[s] between client and lawyer." Appellant's jail cellmate does not qualify as a "third person[] . . . who [is] present to further the interest of the client in the consultation," nor was the cellmate someone "to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted." Rather, the cellmate was simply an officious intermeddler whose role in drafting these letters was to funnel false "facts" to appellant's unwitting lawyer.

V. Refusal to Allow Designated Counsel to Object Not Abuse

Appellant contends the trial court abused its discretion in refusing to allow Ms. Wolk to make objections to the argument of the prosecutor. No abuse transpired.

A day following conclusion of testimony, Henry Salcido, appellant's counsel, requested Ms. Wolk be permitted to monitor the prosecutor's closing argument and make appropriate objections. Although acknowledging Ms. Wolk had not been present throughout the trial, he argued she had participated in the trial "since day one" and had read the daily transcripts. He clarified that he alone would argue for the defense and that Ms. Wolk would be the only one making any objections to the prosecutor's argument.[9] Ms. Wolk verified she had read all the trial transcripts and represented she was able to carry out her role.

The prosecutor stated he had no prior notice of this request and sought time to research the matter. The trial court allowed the prosecutor to do so. The court tentatively

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[9] Janet Dockstader was Mr. Salcido's cocounsel since October 9, 2007, and the trial court noted although she did not examine witnesses, she "clearly [had] participated in the defense" and was "part of the defense team throughout the trial."

ruled its decision was a discretionary call and, based on the record, the court was inclined to allow Ms. Wolk to make objections, but only legal objections, to the prosecutor's argument.

When the proceedings resumed after the lunch break, the prosecutor acknowledged the matter was within the court's discretion and that he had not found any legal authority to preclude Ms. Wolk's participation. He argued Mr. Salcido, however, should be the one making any objections.

After announcing it also did not find any cases on point, the trial court explained why it would not be appropriate to allow a third attorney at this stage of the proceedings without prior notice to the court or People to appear specially for the purpose of making objections during argument on behalf of the defense.

The court stated it had the authority and discretion to set the ground rules for the trial and did not believe Ms. Wolk should be allowed to sit at the counsel table or substitute in for the purpose of making objections during argument. The court observed objections during argument and trial are a matter of much strategy and, for a variety of reasons, a prosecutor or defense counsel may elect not to exercise an objection which properly could be made and pointed out Ms. Wolk was not present "to experience the give and take of [the] trial."

Mr. Salcido stated Ms. Wolk was the one who had prepared the motions in this case and argued she was far more knowledgeable than he in this area. After emphasizing her qualifications, experience, and knowledge of the case, he argued she was a leading authority on what might be improper argument by a prosecutor and that she handled appeals. He added she was appellant's choice and asked the court to implement appellant's right to counsel (U.S. Const., 6th Amend.) by granting his request.

The court denied appellant's request for "Ms. Wolk [to] be seated at counsel table as part of the defense team" but advised Ms. Wolk would be allowed to remain in the courtroom spectator section and to confer with appellant's other counsel during recesses. The court did allow Ms. Wolk to confer with Mr. Salcido before closing argument.

"[S]ection 1044 . . . vests the trial court with broad discretion to control the conduct of a criminal trial: 'It shall be the duty of the judge to control all proceedings during the trial . . . with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.'" (*People v. Calderon* (1994) 9 Cal.4th 69, 74-75; accord, *People v. Hernandez* (2004) 33 Cal.4th 1040, 1048; see § 1095 [in a noncapital case, "the court may, in its discretion, restrict the argument to one counsel on each side].) Abuse of discretion occurs when the trial court acts arbitrarily, irrationally, or when "its ruling 'fall[s] "outside the bounds of reason."' [Citations.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 714.)

In this instance, the trial court acted well within its discretion in disallowing Ms. Wolk to appear at this late stage of the trial for the sole purpose of making objections to the prosecutor's argument. Aside from the possible distraction her appearance for the first time on behalf of the defense would cause for the jury and potential disruption of the prosecutor's argument through unanticipated objections, Ms. Wolk's participation might give rise to ineffective assistance of counsel. For instance, credibility was a principal issue. Ms. Wolk could not object effectively to any comment by the prosecutor regarding a particular witness's credibility based on such witness's demeanor. She was not present when any witness testified. (See *People v. Manson* (1976) 61 Cal.App.3d 102, 197-203.)

Additionally, a result more favorable to appellant would not have been reasonably probable had Ms. Wolk been allowed to object to the prosecutor's argument. (See *People v. Seaton* (2001) 26 Cal.4th 598, 683.) Appellant does not assign any particular instance of misconduct arising from one or more comments made by the prosecutor during argument. (*People v. Snow*, *supra*, 30 Cal.4th at pp. 93-95.) Moreover, any improper comment would have been nonprejudicial. The jury was admonished that argument of counsel was not evidence and to base its decision only on the evidence presented. The jury is presumed to have adhered to this instruction. (*People v. Gray* (2005) 37 Cal.4th 168, 217.)

For a contrary conclusion, appellant cites *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140 (*Gonzalez-Lopez*). His reliance is misplaced. In *Gonzalez-Lopez*, the

defendant's family retained Attorney John Fahle to represent him on a drug-related charge. After the arraignment, defendant retained Joseph Low, a California attorney. A week after an evidentiary hearing before a Magistrate Judge, defendant informed Fahle he wanted Low alone to represent him. The district court twice denied Low's application for admission *pro hac vice* without explanation. The appellate court dismissed Low's application for a writ of mandamus. As the case proceeded to trial, Low was forbidden to contact Karl Dickhaus, Fahle's replacement, and his only contact with defendant was the night before the guilty verdict was returned. (*Id*. at pp. 142-143.)

The Supreme Court concluded the trial court violated the defendant's Sixth Amendment right of counsel in light of the Government's concession of erroneous deprivation of such counsel and found the violation to be structural error mandating reversal. (*Gonzalez-Lopez, supra*, 548 U.S. at pp. 148-150.) In finding the error to be structural in nature, the Court explained: "Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the 'framework within which the trial proceeds,' [citation]--or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." (*Id*. at p. 151.)

These are not our facts. Appellant, unlike the defendant in *Gonzalez-Lopez*, was represented by his counsel of choice from the inception of the case through presentation of witnesses and argument to the jury. The People do not concede appellant was

erroneously deprived of his right to counsel of choice. *Gonzalez-Lopez*, which does not address what constitutes a deprivation of such counsel, therefore does not inform on whether the preclusion of Ms. Wolk from making objections to the argument of the prosecutor amounts to a violation of the right to counsel of choice.

VI. Cumulative Effect of Assigned Errors Nil

Contrary to appellant's claim, he was not denied a fair trial in light of the totality of the assigned errors. The cumulative effect of such nonexistent errors is nil. (*People v. Samayoa* (1997) 15 Cal.4th 795, 849 ["In light of our conclusions . . . that none of defendant's claims of error, considered separately, has merit, we reject defendant's contention that cumulative error requires reversal"].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.